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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

KELSEY CASCADIA ROSE JULIANA, et al., Plaintiffs, v. **UNITED STATES OF AMERICA**, et al., Federal Defendants.	Case No. 6:15-cv-01517-TC **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY** **Expedited Hearing Requested**

INTRODUCTION

A stay of this litigation is appropriate because the United States has moved this Court to certify its Opinion and Order of November 10, 2016 ("November Order") to the United States Court of Appeals for the Ninth Circuit for interlocutory appeal (hereafter "Motion to Certify") and that motion seeks review of dispositive legal issues. If the United States prevails in the

Ninth Circuit, the need for any discovery would be obviated. Plaintiffs nonetheless insist that the parties press ahead with sweeping and burdensome discovery that threatens to disrupt the normal operations of the federal government. By way of example, Plaintiffs have already indicated that they will seek to depose four Cabinet-level officials in addition to high-level federal executives. And they have already propounded nearly 200 document requests. Rather than arbitrating the minutiae of discovery disputes, the most efficient path forward for the Court and the parties is to stay this litigation pending the resolution of the Motion to Certify.[1] *See Landis v. United States*, 299 U.S. 248, 254 (1936) (district court has broad discretion to stay proceedings as an incident to its power to control its own docket).

Beyond these pragmatic considerations, a stay of proceedings pending resolution of the Motion to Certify and possible interlocutory appeal is appropriate because: (1) as established in the United States' Motion to Certify and Reply, the United States is likely to prevail on appeal; (2) the United States will be irreparably harmed absent a stay; (3) Plaintiffs are not likely to suffer significant injury if a stay is granted; (4) and the public interest would be well-served by a stay. Further, the United States respectfully requests a decision by April 17 given the significant legal issues raised and the substantial burden on the United States that discovery imposes.

ARGUMENT

If the Court agrees to certify the November Order for interlocutory appeal, then it should exercise its "inherent power to control the disposition of the causes on its docket [to] promote

[1] Plaintiffs invite the United States to file a motion for a protective order. Pls.' Resp. in Opp'n to Fed. Defs.' Mot. to Stay Litigation 10 ECF No. 134. Given the substantial burden imposed by Plaintiffs' pending discovery requests and their concomitant clear overreach, the United States will do so should a stay not be granted. Such a motion would be supported by declarations demonstrating with particularity the significant burden posed by Plaintiffs' discovery requests described throughout this motion.

economy of time and effort for itself, for counsel, and for [the] litigants" by staying discovery and other further proceedings pending appeal. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962); *see also Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Filtrol Corp. v. Kelleher* 467 F.2d 242, 244 (9th Cir. 1972); *Mediterranean Enterprises, Inc. v. Ssangyong Corp*, 708 F.2d 1458, 1465 (9th Cir. 1983) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.") (quoting *Leyva v. Certified Grocers of Cal.*, 593 F.3d 857, 863 (9th Cir. 1979). Particularly given the sweeping scope of Plaintiffs' claims and pending discovery requests, it would be most efficient for the court to await a ruling from the Ninth Circuit before delving into extensive, and possibly unnecessary, discovery.

Moreover, a stay is further warranted based on a balancing of the four traditional stay factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 425–26 (2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).[2] Plaintiffs criticize the United States for "conflating" the standard for interlocutory appeal and for a stay by referencing its arguments in its Motion to

[2] As explained by the district court in *American Hotel & Lodging Association v. City of Los Angeles*, No. 14-cv-09603-AB (SSx), 2015 WL 10791930, at *2 (C.D. Cal. Nov. 5, 2015), the four-factor *Nken* standard applies "specifically to stays of the *enforcement* of an order or judgment, not stays of an action during interlocutory appeal." (emphasis added). Thus, while an analysis of these factors provides further justification for a stay pending appeal here, the showing required under *Nken* to justify a stay of enforcement is not required where, as here, a stay pending appeal would "promote economy of time and effort." *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972) (quotation and citation omitted).

Certify. But the standards are not separate. They instead represent part of a single continuum: the more likely it appears that a party will prevail on appeal, the less irreparable injury that party must show. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Here, as discussed below, all relevant factors favor a stay.

1. GIVEN THE UNPRECEDENTED NATURE OF THE RIGHTS FOUND AND THE RELIEF SOUGHT, THE UNITED STATES HAS ESTABLISHED LIKELIHOOD OF SUCCESS.

The United States has demonstrated likelihood of success on the merits because there is no legal support for finding standing—and in particular, the elements of causation and redressability—where, as here, the Court's decisions conflict with Supreme Court standing jurisprudence in a manner that raises significant separation of power concerns. Similarly, there is no basis—in the Constitution or relevant precedent—for finding the "fundamental right" under the Due Process Clause recognized in the decisions, or for the recognition of a public trust doctrine applicable to the Federal government. Reply in Supp. of Fed. Defs' Mot to Certify Order for Interlocutory App. ("Interlocutory Reply") at 10-14, 21-25. And no admission in the United States' answer diminishes or undermines these legal arguments despite Plaintiffs' suggestions to the contrary. ECF No. 134 at 6.

Further, this Court's inquiry can properly consider the likelihood of an interlocutory appeal and the likely scope of the Ninth Circuit's review in determining the propriety of a stay. If the Ninth Circuit were to accept the interlocutory appeal, this Court would lack jurisdiction over this matter. The filing of an interlocutory appeal "divests the district court of jurisdiction to *proceed with trial.*" *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir.1992) (emphasis added; citation omitted). And such a filing also "divests the district court of jurisdiction over the particular issues involved in that appeal." *City of L.A. v. Santa Monica Baykeeper*, 254 F.3d 882, 886 (9th Cir. 2001); *see Braun-Salinas v. Am. Family Ins. Grp.*, No. 3:13-cv-264-ac, 2015 WL 128040, at *2 (D. Or. Jan. 8, 2015) (same). Because the issues raised by the United States in the Motion to Certify substantially affect the merits of the case—including whether it may proceed in the first instance—an interlocutory appeal would divest this Court of jurisdiction. *Ariav v. Mesch, Clark & Rothschild, P.C.*, No. 03-cv-464-TUC-MHM, 2005 WL 3008616, at *1 (D. Ariz. Nov. 8, 2005) (finding that the issue of jurisdiction in a Family Medical Leave Act suit was "intertwined with the merits, and therefore, any discovery in this matter would necessarily implicate the jurisdictional issue on appeal.").

Plaintiffs' contention, that this Court need not consider whether the United States is likely to prevail on its Motion to Certify or whether the issues raised in that Motion are dispositive, is therefore misguided. ECF No. 134 at 3-4. Indeed, the cases cited by the United States make plain that it is appropriate to consider such factors in determining whether a stay is appropriate during the pendency of a motion seeking interlocutory appeal. *See Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1323 (D. Or. 1997); *Scallon v. Scott Henry's Winery Corp.*, No. 6:14-cv-1990-MC, 2015 WL 5772107, at *1 (D. Or. Sept. 30, 2015), *appeal filed*, No. 15-35952 (9th Cir. Dec. 10, 2015). Where, as here, an interlocutory appeal involves a controlling issue of law, courts routinely stay litigation in its entirety pending a decision by the court of appeals. *See Umatilla*, 962 F. Supp. at 1323; Order, *Nutrishare Inc. Conn. Gen. Life Ins. Co.*, No. 2:13-cv-23778-JAM-AC (June 12, 2014). Given that the United States provided ample grounds to support its Motion to Certify—which could deprive this Court of jurisdiction—this also militates in favor of a stay.

2. THE UNITED STATES WILL SUFFER IRREPARABLE INJURY ABSENT A STAY GIVEN THE IMMENSE DISCOVERY BURDEN AND THE ISSUES AT STAKE.

The discovery sought in this case is extraordinary: the United States does not, as Plaintiffs argue, contest participating in a normal discovery process but rather to the extremely broad and highly intrusive discovery sought here. Plaintiffs have demanded (or have stated they will seek) discovery that sets this case apart. Plaintiffs have indicated that they will notice the depositions of four Cabinet-level Secretaries and other high-level officials. And they have also signaled their intent to seek twelve 30(b)(6) depositions on yet-to-be disclosed topics, which, if experience proves any guide, will require multiple agency designees and countless hours of preparation. What is more, Plaintiffs have propounded approximately 200 Requests for Production[3] on the defendant agencies and executive components that are sweeping in their breadth. By way of example, Plaintiffs have demanded that the President and the Executive Office of the President produce each document that refers, relates, regards or pertains to the issue of climate change over numerous Presidential administrations. They have also propounded on the State Department 70 requests, three of which seek every document related to briefings on climate change to every Secretary and new administration from 1965 to present. Some of Plaintiffs' documents requests are time-limited to several decades and some lack any time limit at all. Further, Plaintiffs have propounded Requests for Admissions that seek admissions not on facts but rather on scientific theories that go to the central legal issues in this case.

But this is presumably just the beginning. While Plaintiffs' discovery requests are already oppressive, it bears noting that this Court has not yet set a discovery schedule. In the

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[3] Plaintiffs have also propounded another approximately 200 Requests for Production seeking documents in Presidential Libraries or archives. A large majority of these documents are protected by the Presidential Records Act or are classified.

Joint Status Reports filed with this Court and their January 24, 2017 document preservation letters, Plaintiffs have telegraphed their intent to file numerous more discovery requests without any reasonable substantive or temporal limits. ECF Nos. 119, 131 and 121-1 (Ex. A). While Plaintiffs contend that this Court should not view their January 24, 2017 letter as imposing any burden, they have no basis for that statement except the speculation of counsel who does not work at any of the federal agencies sued and who claims no expertise in discovery matters. ECF No. 134 at 7-9.[4] Plaintiffs pay lip service to narrowing discovery; yet they have not done so as their discovery requests make evident. ECF No. 134 at 9. Rather, they have made plain that they intend to file more discovery of an indefinite nature. In short, the scope of fact discovery in this matter lacks any reasonable bounds and would disrupt the normal operations of the defendant agencies and executive components.

The expert phase of discovery will also be extraordinary in its reach. Plaintiffs have provided a list of eleven experts spanning numerous disciplines from geology to ocean acidification, hydrology, psychiatry, medicine, economics, and political science. And Plaintiffs have indicated they may call additional experts. All parties, including Intervenor-Defendants, will retain affirmative and rebuttal experts on many, if not all, of these disciplines. Expert discovery will therefore be complicated, resource-intensive and long-drawn-out. Plaintiffs make no arguments to the contrary.

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[4] Plaintiffs continue to claim that the United States is destroying relevant documents but they provide no credible basis for this assertion. ECF No. 134 at 8. Plaintiffs conflate the routine updating of websites for document destruction, which it is not. *Id.* Nor does the existence of passive document destruction protocols mean that records relevant to Plaintiffs' claims are being destroyed. *Id.* Rather, the defendant agencies are undertaking reasonable efforts to preserve relevant documents through reasonable litigation holds notwithstanding the immense burden imposed. And the only precedent that Plaintiffs cite to establish that their proposed litigation hold is not oppressive involved a narrow claim over a few years, not a limitless claim over nearly seven decades. *See E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 755 (9th Cir. 1991).

Plaintiffs contend that mere participation in discovery is not sufficient to establish irreparable harm. ECF No. 134 at 7. But, unlike the cases on which Plaintiffs rely, the discovery contemplated here is no ordinary discovery. *See id*. None of the cases Plaintiffs cite involved discovery that would disrupt the operations of Cabinet-level Secretaries during their first few months on the job, or 30(b)(6) deposition notices directed at the Executive Office of the President. And none of the cases Plaintiffs cite seek, as Plaintiffs do here, to disrupt the lawful functions, duties, and policy priorities of the duly-elected Executive Branch of the United States all of whom are under a constitutional duty to "take Care" that the laws of the United States are "faithfully executed." U.S. Const., art. II, § 3. More broadly, none of the cases Plaintiffs cite involve the shockingly broad breadth of discovery sought in the case. *See DKS Inc. v. Corp. Bus. Sols., Inc.*, No. 2:15-cv-132-MCE-DAD, 2015 WL 6951281, at *2 (E.D. Cal. Nov. 10, 2015) ("the discovery that has apparently been served in this case is far from crippling"), *aff'd* No. 15-16589, 2017 WL 167475 (9th Cir. Jan. 27, 2017). Further, unlike the precedent upon which Plaintiffs rely, the United States' harm is not merely based on the expense of discovery, but also its extraordinarily intrusive and disruptive nature. *See* ECF No. 134 at 7 (citing *Welch v. My Left Foot Children's Therapy, LLC*, No. 2:14-cv-1786-MMD-GWF, 2016 WL 5867410, at *1 (D. Nev. Oct. 6, 2016) ("Defendants' contention of irreparable harm is premised primarily on the expenses of discovery and of having to file a motion to dismiss.")); Order Denying Mot. to Stay, *Lam v. City & Cty. of San Francisco*, No. 10-cv-4641-PJH, ECF No. 127 (N.D. Cal. July 16, 2016) (Ninth Circuit lacks jurisdiction to entertain appeal and plaintiff cannot complain about discovery when it initiated suit). And, unlike the present case, none of the cases Plaintiffs cite involve dispositive issues or make the strong showing made here justifying interlocutory appeal. *Lopez*, 713 F.2d at 1435 (holding that the need for a showing of irreparable harm is diminished where there is a strong showing that an appeal is warranted).

Plaintiffs attempt to distinguish one of the cases upon which the United States relied in its motion to stay (ECF No. 121 at 6), *H.A.L. v. Foltz*, No. 3:05-cv-873-J-33MCR, 2008 WL 591927, at *1 (M.D. Fla. 2008), on the ground that no party in *H.A.L.* challenged the stay and that it involved qualified immunity. But Plaintiffs read *H.A.L.* too narrowly. In *H.A.L.*, the qualified immunity defense was important because it raised a dispositive defense and "defendants should not be subjected to the burdens of discovery" until resolution of that central issue. *Id.* In a similar vein and outside of the qualified immunity context, courts have granted a stay where the issues raised were dispositive and a stay would promote judicial economy. *See, e.g., Von Drake v. Nat'l Broad Co.*, No. 3-04-CV-0652-R, 2004 U.S. Dist. Lexis 25090, at *3 (N.D. Tex. May 20, 2004) (finding that staying discovery "may be appropriate where the disposition of a motion to dismiss 'might preclude the need for discovery altogether thus saving time and expense.'") (citations omitted); *Dukes v. Miami-Dade Cnty.*, No. 05-cv-22665, 2007 WL 4336319 at *1 (S.D. Fla. Dec. 7, 2007) (recounting that the court had entered a "stay of discovery pending the Eleventh Circuit's resolution of Defendants' interlocutory appeal," which had been based on principles of judicial economy and undue burden). Here, given the exceptionally broad scope of discovery sought, the immense burden imposed, and the strength of the United States' motion seeking interlocutory appeal, a stay is warranted.

Moreover, to the extent Plaintiffs complain that a stay would unduly delay discovery, such a clam is also misguided. ECF No. 134 at 10. As discussed in the United States' reply brief in support of its Motion to Certify, appellate review could dispose of this action entirely.

Interlocutory Reply at 3. Plaintiffs' attempt to invoke an expansive (and potentially limitless) constitutional right to suggest that discovery will continue regardless of the outcome of any appeal to the Ninth Circuit ignores the United States' arguments in its Motion to Certify seeking review of the decisions' constitutional holdings. *Id.* at 10-25. Discovery is thus not a foregone conclusion: it is likely inappropriate in the first instance. *Id.* at 16-18, 26. In any event, the stay sought here is time-limited, and would be lifted should the United States not prevail in this court or in the Ninth Circuit.

Beyond these considerations, this Court should stay discovery because this action is unmoored to any statute that could limit its scope and, by extension, the scope of documents sought. If Plaintiffs had properly brought suit under the APA or agency-specific statutes challenging discrete agency acts or failures to act, judicial review would be limited to a specific action or set of actions and on the administrative record. To this end, the United States is not attempting to use the APA as a tool to truncate Plaintiffs' ability to litigate any infringement of their alleged constitutional rights as Plaintiffs suggest (ECF No. 134 at 10) but rather to point out the fundamental legal principle that Plaintiffs must show that there has been a waiver of sovereign immunity *even where constitutional claims are raised*. The fact that Plaintiffs have brought an equitable action without statutory authority—or, by extension, the requisite waiver of sovereign immunity—makes Plaintiffs' intended discovery all the more inappropriate, and further weighs in favor of a stay pending resolution of the Motion to Certify and any related appellate proceedings. *CMAX*, 300 F.2d at 268 (where it would promote "the orderly course of justice," a stay is appropriate).

In short, given the breadth of the claims, their temporal scope, and scientific complexity, the discovery is likely to be time-consuming and resource-intensive and the litigation burdens that would occur as a result are likely to significantly impact Federal Defendants in their efforts to conduct their operations. A stay during the pendency of the United States' motion seeking interlocutory appeal is thus justified.

3. PLAINTIFFS HAVE NOT ESTABLISHED THAT THE TEMPORARY STAY PROPOSED WILL IRREPARABLY HARM THEM.

Plaintiffs have not presented any credible argument that a temporary stay of these proceedings during the pendency of an appeal will appreciably harm them. First, Plaintiffs contend that any delay of this action is tantamount to imminent irreparable harm due to presumed impacts of the future actions of the new administration. Plaintiffs' bases for this alleged harm are "repeat[ed] promise[s]" and executive orders that are not themselves final agency actions. ECF No. 134 at 10-11. This kind of speculation is a slender reed on which to base claims of imminent irreparable harm. Moreover, Plaintiffs delayed bringing this action until 2015 and elected to pursue novel constitutional and public trust claims rather than to challenge (as they must) discrete agency action with the appropriate waiver of sovereign immunity. Plaintiffs offer no excuse for their own delay. They do not contend that they were unaware of their claims earlier; indeed, they argue that "[f]or more than fifty years, Federal Defendants knowingly and substantially contributed to the urgent climate crisis upon which Plaintiffs' claims are founded." Pls.' Resp. in Opp'n to Fed. Defs.' Mot. to Certify Order for Interlocutory Appeal 11, ECF No. 133. And in April 2007, a decade ago, the United States Supreme Court addressed climate change in *Massachusetts v. EPA*, and Plaintiffs are surely aware that the States in that case argued that climate-change needed to be addressed in the near-term. 549 U.S. 497 (2007). Nonetheless, Counsel waited until eight years after *Massachusetts v. EPA* was decided to file this lawsuit; they can hardly assert that Plaintiffs are prejudiced by the requested stay. Any delay corresponding to the need for interlocutory appellate review is eminently justified.

Second, Plaintiffs' argument that the nature of their alleged injuries—environmental and constitutional—renders them irreparable falls of its own weight. Under Plaintiffs' theory, any *alleged* environmental injury or any constitutional injury must proceed to discovery and trial regardless of the equities or the countervailing legal arguments. ECF No. 134 at 11-12. But this is not the law. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied") (quotation marks and citation omitted). Here, given that there is no precedent that supports (1) the constitutional rights Plaintiffs assert or, more fundamentally, (2) the standing to assert them, they have likewise failed to show that they will be irreparably injured by the temporary stay proposed. *See* Interlocutory Reply 10-25.

Third, Plaintiffs' complaint that they are harmed by any stay because of the alleged destruction of documents is patently baseless. As discussed *supra*, the defendant agencies and executive components are instituting reasonable litigation holds. It is not the job of Plaintiffs to dictate the scope of the litigation hold or to police those efforts. And while Plaintiffs claim they have made good faith efforts to clarify the scope of the holds in place, in fact they have demanded materials subject to the attorney-client privilege. April 3, 2017 Joint Status Report, ECF No. 131. Such a request is unreasonable on its face. Plaintiffs cannot plausibly premise a claim of imminent irreparable harm on the United States' reasonable refusal to waive attorney-client privilege.

Finally, and most significantly, because Plaintiffs' claims involve complex scientific issues, will require significant expert discovery, and involve factual allegations concerning conduct that took place over several decades, discovery and a trial in this case are accordingly likely to be complex and time-consuming. Moreover, because discovery in this case has just begun, the Court will not have to weigh the burden associated with halting discovery midstream. And the time needed for any appeal is overshadowed by the time it would take to complete discovery and proceed to trial in this case. Contrary to Plaintiffs' assertions, a case of this magnitude could not possibly be tried in this calendar year, or even the next based on the breadth of the discovery requests served to date. The additional time needed for an appeal of the legal issues is relatively modest by comparison. *Scallon*, 2015 WL 5772107, at *2 (noting that plaintiffs' claims "date back many decades" and that a "comparatively brief delay to resolve this potentially dispositive issue of law cannot be said to cause Plaintiffs substantial injury").[5] Mere delay occasioned by a stay pending an appeal has been found to be negligible in comparison to the immense burdens associated with discovery where the issues on review may potentially dispose of the action. *See In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 6 (D.D.C. 2002) (harm from delay occasioned by appeal "when juxtaposed to the substantial magnitude of a decision by the Court of Appeals on the issues before it, is simply *de minimis*").

1. That the Public Interest Is Promoted By The Stay Is Shown By The Fundamental Nature of The Separation Of Powers Concerns Raised And By The Facts That Critical Agency Functions And Limited Government Resources Are At Stake

[5] Plaintiffs claim that *Scallon* is inapposite because a stay could not preserve the status quo misses the mark. ECF No. 134 at 15-16. As here, the ultimate issue in *Scallon* was whether the issue for which appeal was sought was dispositive, not whether the status quo could be preserved. *Scallon*, 2015 WL 5772107, at *2. As discussed *supra* and in the United States' reply in support of it Motion to Certify, the issues raised in the Motion to Certify are dispositive of this action.

The Motion to Certify raises core separation of power concerns and "the public interest lies with correctly resolving the question of law at issue here. . . ." *Scallon*, 2015 WL 5772107, at *2. Plaintiffs demur that they do not seek to infringe upon the powers of our elected public representatives because they seek an "adequate [ ] remedy" to "unconstitutional deprivations" of Plaintiffs' alleged constitutional rights. ECF No. 134 at 16. But, as Plaintiffs' vague protestations make clear, that is precisely what they are seeking. The questions raised here will necessarily implicate how best to protect the atmosphere and other aspects of the environment while promoting other important values such as employment, national security, affordable energy, balance of trade, job creation, international affairs, and energy independence. The balancing involved in resolving these critical policy questions are the province of the legislature, not the judicial branch. Plaintiffs' assertion of infringement on unenumerated constitutional rights cannot, as they imply, diminish these separation of power concerns. ECF No. 134 at 17-18. Rather, the unenumerated and boundless nature of the rights alleged amplifies the need for appellate resolution.

The public interest also weighs heavily in favor a stay because of the intrusive nature of the discovery sought (and the discovery that Plaintiffs have indicated they will bring) against the Executive Branch. As discussed above, Plaintiffs seek to depose four Cabinet-level officials and will demand a 30(b)(6) witness from the Executive Office of the President. This does not evince, as Plaintiffs claim, a credible attempt to "ensure that discovery in this case is as minimally intrusive as possible. . . ." ECF No. 134 at 17. If a stay is not granted, the Executive Branch and its agencies (including the Executive Office of the President) would be subject to continued discovery, and would be forced to divert substantial resources away from their essential functions of faithfully executing the law. In this regard, Plaintiffs' reliance on *Clinton v. Jones*, 520 U.S. 681 (1997), to justify the proposed intrusion on the Executive Branch is wholly misplaced. ECF No. 134 at 17. *Clinton v. Jones* did not question the important goal of insulating the Executive Branch from intrusive and disruptive discovery. Rather, the *Clinton* Court held that the President could not avoid discovery in a case that involved his personal conduct about which he alone had knowledge. *Clinton*, 520 U.S. 681. No such claim can be made here. Rather, the discovery served on the President here is especially problematic in light of the absence of controlling statutory authority and the effect such discovery would have on the normal operations of the Executive Branch. *See* Mot.to Certify 17; Interlocutory Reply 18; *Mississippi v. Johnson*, 71 U.S. (4 Wall) 475, 501 (1866) ("this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."). The public interest accordingly will be served by staying this litigation.[6]

Finally, as the United States argued in its Motion for Stay (ECF No. 121 at 7-8), the provision for interlocutory appeal in 28 U.S.C. 1292(b) is intended to materially advance the litigation by allowing for the resolution of dispositive issues by the court of appeals. This serves judicial economy by avoiding an unnecessary strain on the courts and limits the burden on parties by avoiding protracted litigation of meritless claims. The requested stay advances those

[6] Plaintiffs give short shrift to the United States' argument that the change in administration also favors a stay; they distinguish *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 10 (D.D.C. 2009) without addressing directly the basis for the United States' arguments. ECF No. 134 at 18. These arguments are two-fold. As an initial matter, officials are only now coming on board, rendering discovery on these officials inefficient and unnecessary at this juncture. Second, counsel for the United States must brief incoming administration officials with decision-making responsibility concerning the extensive scope of matters involved in this litigation, including the anticipated and immediate discovery burden, which will take a significant period of time. This is no small task. Not only will these officials need to become familiar with the subject matter and issues presented, but they will also need to seek legal counsel from both their internal agency/departmental attorneys as well as from the Department of Justice attorneys with primary responsibility for this case.

goals and the public interest more broadly where agency functions and limited government resources are at stake.

CONCLUSION

For the reasons discussed above, the United States respectfully requests that the Court stay this litigation until the earliest of (1) such time as the Court of Appeals refuses to accept an interlocutory appeal of the Court's November 10, 2016 order; or (2) such time as the Court of Appeals has ruled on the certified questions and issued its mandate to this Court.

Dated: April 10, 2017

Respectfully submitted,

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Certificate of Service

I hereby certify that April 10, 2017, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will provide service to all attorneys of record.

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